**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**WINDING UP CAUSE NO. 57 OF 2001**

**IN THE MATTER OF K & A SELF SELECTION STORES LIMITED**

**AND**

**IN THE MATTER OF COMPANIES ACT**

**AND**

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**DILSHAD SADRUDIN MOHAMED as the legal representative of the**

**estate of Sadrudin H. Mohamed (Deceased).....CLAIMANT**

**AND**

**K & A SELF SELECTION STORES LIMITED.....1ST RESPONDENT**

**KHATUN SHAMSHUDIN MOHAMED as the legal representative of the estate**

**Of Shamshudin H. Mohamed(Deceased).....2ND RESPONDENT**

**GHALIB S. MOHAMED.....3RD RESPONDENT**

**KHATUN S. MOHAMED.....4TH RESPONDENT**

**RULING**

1. This Dispute, presented to Court as a Winding Up Petition some 16 years ago, rages on. This is now an effort to bring it to a close through the Claimants Amended Chamber Summons dated 30th November 2016 and filed on 6th December 2016 for the Adoption of the Award on issue Number 4 of The Arbitration Tribunal's Award dated 27th May 2004 as a Judgement of the Court. It also seeks that the Award be declared binding and enforceable as a Decree of Court.

2. That Summons is predicated substantially on the Provisions of Section 36(1) of The Arbitration Act

(The Act) which provides as follows:-

> "(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37".

3. The history of the litigation is set out by both parties and is generally common ground.

4. The Claimant is the executor of the Estate of the late Sadrudin Hassan Mohamed (**The Deceased**). The Deceased was a minority shareholder of K & A Self Selection Stores Limited. Being unhappy about the manner in which the affairs of the Company were conducted, he sought its Winding Up on the grounds that it was just and equitable. That Cause was resisted.

5. Over time, the parties agreed to refer the dispute to Arbitration. The parties crafted the issues to be determined by the Arbitrator into the following:-

> 1. The price at which the shares of K & A Self Selection Stores Limited are to be transferred by the Estate of Sadrudin H Mohammed to the intended purchaser (name the intended purchaser).
>
> 2. In arriving at such price, the Arbitrator(s) shall have regard to the monies appropriated by the management of K & A Self Selection Stores Limited 9if any) and not accounted for by them to the Estate and also of any loans that they may have been advanced to the Company.
>
> 3. Are the Directors liable to the shareholder for any wrong doing and if so what wrong doing?
>
> 4. At the time of the split of the Fish and Chips shops, Mr. Aziz Mohammed represented to the Estate that the Estate should accept the split on his assurances that once the split was formalized (as it was), he would ensure that proper accounts and explanations would in due course be agreed on. Are the Directors further liable to the shareholder for any further sums in respect of this issue?

6. On 27th May 2005 the Arbitral Tribunal made an Award on the four issues presented to it. On 28th August, 2004, the Claimant sought a recognition and adoption of the entire award, while on 30th August 2004, the Respondents filed a Chamber summons seeking to set it aside. Kimondo J. considered the setting aside Summons and in a Ruling of 20th January 2014 set aside the Award on issues 1,2, and 3 but upheld issue No.4.

7. It would be expected that the Application before Court would be plain sailing in so far as it seeks the adoption of issue No.4 which was expressly upheld by the Judge on 20th January 2014. But the Respondents do not think so.

8. In an Affidavit of Ghalib Shamshudin Mohamed sworn on 2nd May, 2017, the Respondents explain themselves. The Respondents first make the point that the basis of the Referral Agreement was Article 39 of the Articles of Association of the Company. And that the type of dispute contemplated thereunder would be those affecting members of the Company.

9. The Respondents argue that issue No.4 involved persons who were not Members of the Company and the same could not be capable of being referred to Arbitration. The Respondents then assert,

> "That the issue raised herein regarding the validity of the Arbitration Agreement on issue No.4 was not before the Court when it determined the Respondents Application to set aside the Award and the Court did not therefore consider the same".

10. This Court has considered the Application and Reply thereto and the arguments made by Counsel in the Oral address to Court on 9th May 2017. This is the view I take.

11. Whatever the strength of the Respondents' arguments that the Arbitration agreement on issue No.4

was invalid, the same may not be available for entertainment by the Court at this point. Whilst it may be true that the issues regarding its validity were never raised before Court in the setting aside proceedings a question begs as to why it was not done.

12. The Respondents do not tell Court that they could not have raised the issue then. The setting aside application mounted by the Respondents was brought under Section 35 of the Arbitration Act. Subsection (2) a(ii) provides for the challenge to an Award on the ground that the Arbitration Agreement is not valid under the Law to which the parties have subjected it, or failing any indication of that law, the Laws of Kenya.

13. The Doctrine of Res judicate applies as much to Applications as it does to suits. Explanation No. 4 of Section 7 of The Civil Procedure Act on Res judicate is relevant here and provides:-

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

A matter which might or ought to have been a Ground of Defence or attack in a former Application shall be deemed to have been a matter directly and substantially in issue in such matter. The latter matter is taken to be res judicate the former Application. As the challenge on the ground of invalidity could have been properly taken up in the Application of 30th August 2004 then it is Res judicate that Application.

14. A party should not be allowed to litigate in installments. That would be inimical to Public Policy. In addition there is a concept of finality of an Arbitral Award. The Respondents took their chance to set aside the Award in the Application of 30th August 2004 but chose not to be exhaustive in their quest. The door has now closed and this matter should, and must, be brought to an end.

15. The Application of 30th November 2016 is merited and is hereby allowed as prayed. Costs to the Claimant.

**Dated, Signed and Delivered in Court at Nairobi this 29th day of June, 2017.**

**F. TUIYOTT**

**JUDGE**

***PRESENT;***

Chacha h/b Ochieng for Applicant

Wanjohi for Respondent

Alex - Court Clerk